

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**PORFORIO MORENO MUNOZ**

**Petitioner,**

**vs.**

**UNITED STATES OF AMERICA**

**Respondent.**

**CR-F-02-5422 REC  
03-CV-6255 AWI**

**ORDER DENYING CERTIFICATE  
OF APPEALABILITY**

On September 11, 2007, the Court entered an order denying Porforio Moreno-Munoz's ("Petitioner's") application for a writ of habeas corpus pursuant to 28 U.S.C. section 2255 challenging his conviction for violation of 8 U.S.C. section 1326, deported alien found in the United States.

On October 15, 2007, Petitioner filed a notice of appeal of the district court's order. Because the order denying Petitioner's 2255 motion was sent to Petitioner's attorney of record, and because Petitioner's attorney did not timely notify Petitioner of the denial, Petitioner's notice of appeal and request for order of appealability is deemed timely. The controlling statute, 28 U.S.C. § 2253, provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The Supreme Court has found that the Court should issue a certificate of appealability when the petitioner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel, 120 S.Ct. 1595, 1603 (2000). The requirement that the petitioner seek a certificate of appealability is a gatekeeping mechanism that protects the Court of Appeals from having to devote resources to frivolous issues while at the same time affording petitioners an opportunity to persuade the Court that through full briefing and argument the potential merit of claims may appear. Lambright v. Stewart, Nos. 96-99020, 96-99025, 96-99026, 2000 WL 1118937 (9th Cir. Aug. 4, 2000). The Supreme Court has found that the even the application of an apparently controlling Ninth Circuit rule can be debatable if it conflicts with the rules of another circuit or there is reasonable argument of why the Ninth Circuit should reconsider the Ninth circuit rule. See id.

In the present case, the court finds that petitioner has not made the required substantial

1 showing of the denial of a constitutional right to justify the issuance of a certificate of  
2 appealability. The issue in this case was whether Petitioner presented sufficient evidence to  
3 establish that Petitioner's father was physically present in the United States for a period of ten  
4 years prior to the date of Petitioner's birth so that Petitioner could claim derivative citizenship.  
5 Although legal backdrop pertaining to derivative citizenship is somewhat complex, the factual  
6 elements Petitioner was required to establish were clear. There is no question that Petitioner was  
7 unable to make the required showing. Reasonable jurists would not debate that petitioner has not  
8 shown how he is entitled to federal habeas corpus relief.  
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11 Accordingly, the Court hereby ORDERS that petitioner's request for a certificate of  
12 appealability is DENIED.  
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15 IT IS SO ORDERED.

16 **Dated: December 19, 2007**

/s/ Anthony W. Ishii  
UNITED STATES DISTRICT JUDGE